Supreme Court, U.S.
FILED
FEB 12 2009
OFFICE OF THE CLERK

121

No. (1) 081111

In The

Supreme Court of the United States

CHARLES W. BURTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID A. NUNERY
NUNERY & BENNETT, PLLC
105 East Main Street
Campbellsville, Kentucky 42718
Telephone: (270) 789-2466
Fax: (270) 789-0709

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals err in failing to grant Petitioner Charles W. Burton a certificate of appealability on the denial of his 28 U.S.C. § 2255 motion, which alleged that his court-appointed trial counsel was constitutionally ineffective for failing to object to a violation of the Interstate Agreement on Detainers, 18 U.S.C. App. 2, a violation that the United States Court of Appeals for the Sixth Circuit found to be "clear and obvious error" on direct appeal. See *Burton v. United States*, 259 F.3d 503, 516 (6th Cir. 2001).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF CONTENTS	iii
LIST OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Procedural History	2
B. Burton's habeas petition based on ineffective assistance of counsel	4
REASON FOR GRANTING THE WRIT	7
I. The Sixth Circuit's denial of Burton's application for a certificate of appealability conflicts with this Court's precedent on the showing required for a successful application for certificate of appealability	7
A. The standard for granting a certificate of appealability	7
CONCLUSION	17

TABLE OF CONTENTS – Continued

Page

LIST OF APPENDICES

Order entered by the United States Court of Appeals for the Sixth Circuit on June 24, 2008, which denied Charles Burton a certificate of appealability ..... App. 1

Order entered by the United States District Court for the Eastern District of Kentucky on May 23, 2007, which denied Charles Burton's 28 U.S.C. § 2255 motion and further denied Charles Burton a certificate of appealability ..... App. 5

Motion for a continuance filed by Burton's appointed trial counsel on January 6, 1999, which sought to continue the trial scheduled for January 19, 1999 ..... App. 26

Order entered by the district court on January 8, 1999, which set Burton's criminal trial for April 5, 1999 ..... App. 31

Order entered by the United States Court of Appeals for the Sixth Circuit on November 17, 2008, which denied Charles Burton's petition for panel rehearing ..... App. 34

TABLE OF AUTHORITIES

Page

CASES:

Alabama v. Bozeman, 533 U.S. 146 (2001).....14, 16

Batson v. Kentucky, 476 U.S. 79 (1986) 11

Burns v. Gammon, 260 F.3d 892 (8th Cir. 2001).....11

Burton v. United States, 259 F.3d 503 (6th Cir. 2001) .....*passim*

Davis v. Sec'y for the Dept. of Corr., 341 F.3d 1310 (11th Cir. 2003).....11

Ege v. Yukins, 485 F.3d 364 (6th Cir. 2007).....11

Everett v. Beard, 290 F.3d 500 (3rd Cir. 2002).....11

Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993).....11

Jacobs v. Mohr, 265 F.3d 407 (6th Cir. 2001) 12

Miller-El v. Cockrell, 537 U.S. 322 (2003) 7, 8, 17

New York v. Hill, 528 U.S. 110 (2000).....5

Singleton v. United States, 277 F.3d 864 (6th Cir. 2002) 15

Strickland v. Washington, 466 U.S. 668 (1984) ...*passim*

Taylor v. United States, 279 Fed. Appx. 368 (6th Cir. 2008) 12

United States v. Kelley, 402 F.3d 39 (1st Cir. 2005) 15

United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1998) 10

United States v. Paredes-Batista, 140 F.3d 367 (2nd Cir. 1998).....15

TABLE OF AUTHORITIES – Continued

Page

United States v. Span, 75 F.3d 1383 (9th Cir. 1996) 12

United States v. Tucker, 716 F.2d 576 (9th Cir. 1983) 12, 13

United States v. White, 185 Fed. Appx. 504 (6th Cir. 2006) 15

STATUTES:

18 U.S.C. App. 2 ..... 2, 4

28 U.S.C. § 1254 2

28 U.S.C. § 1291 1

28 U.S.C. § 2253 ..... 1, 8

28 U.S.C. § 2255 ..... 1, 2, 4, 6

RULE:

Supreme Court Rule 13.3 1

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Sixth Circuit, which denied Charles Burton a certificate of appealability, is contained in the Appendix (App. 1). A copy of the decision of the United States Court of Appeals for the Sixth Circuit, which denied Charles Burton's petition for panel rehearing is contained in the Appendix (App. 34). The district court's order denying Charles Burton's 28 U.S.C. § 2255 motion and further denying Charles Burton a certificate of appealability is contained in the Appendix (App. 3-25).

JURISDICTION

The district court had jurisdiction of the petition for a writ of habeas corpus under 28 U.S.C. § 2255, and denied relief in its order filed May 23, 2007. (App. 3-25). Burton timely filed a notice of appeal on June 22, 2007 and an application for a certificate of appealability on July 2, 2007, and the court of appeals therefore had jurisdiction under 28 U.S.C. § 2253 and 28 U.S.C. § 1291. The court of appeals' order denying a certificate of appealability was filed on June 24, 2008, and its order denying Burton's petition for panel rehearing was filed on November 17, 2008. (See App. 1 and 34. Under this Court's Rule 13.3, this petition for writ of certiorari is therefore

due by February 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

This case involves an ineffective assistance of counsel claim predicated on trial counsel's failure to preserve a violation of the Interstate Agreement on Detainers, 18 U.S.C. App. 2.

STATEMENT OF THE CASE

Petitioner was the petitioner in the district court, appellant in the court of appeals and will be referred to by his name, Charles W. Burton (Burton), in this petition. Burton's petition for a writ of certiorari arises from the United States Court of Appeals for the Sixth Circuit's denial of Burton's application for a certificate of appealability on an ineffective assistance of counsel claim he asserted in a motion made pursuant to 28 U.S.C. § 2255.

A. Procedural History

Burton was indicted by a Tennessee federal grand jury on December 17, 1997. A superseding indictment was filed on July 21, 1998, and a second superseding indictment was filed on September 15, 1998. The first and second superseding indictments

identified a co-conspirator (David Crozier) who had not been named in the initial charges, and also set out with more specificity the controlled substances Burton was charged with taking and possessing. (See App. 3-25).

The nine-count, superceding indictment alleged that Burton was guilty of the following: conspiracy to distribute and possess with intent to distribute various controlled substances (count one); armed robbery of a pharmacy (count two); using and carrying a firearm during and in relation to a crime of violence (count three); being a felon in possession of a firearm (count four referred to Burton and count five referred to co-defendant David E. Crozier); possession with intent to distribute Schedule II controlled substances (count six); possession with intent to distribute a Schedule III controlled substance (count seven); possession with intent to distribute a Schedule IV controlled substance (count eight); and using and carrying a firearm during and in relation to a drug trafficking crime (count nine). (See App. 6-7).

A bench trial was conducted on April 5-8, 1999, after which Burton was convicted on eight counts. Burton was sentenced on October 27, 1999, to a term of 562 months, the sentence to run consecutive to a Kentucky state sentence.

Burton appealed his conviction to the United States Court of Appeals for the Sixth Circuit. *Burton v. United States*, 259 F.3d 503 (6th Cir. 2001). One of the issues raised in Burton's direct appeal was a

violation of the Interstate Agreement on Detainers, 18 U.S.C. App. 2. Burton's appeal was consolidated with that of his co-defendant, David Crozier. There also was a cross-appeal by the United States.

The Sixth Circuit affirmed Burton's conviction, which vacated Burton's sentence only with respect to the district court's crediting Burton with 650 days for time served. *Burton v. United States*, 259 F.3d 503 (6th Cir. 2001). A petition for rehearing was denied on October 11, 2001. Acting *pro se*, Burton timely filed a petition for writ of certiorari, which was denied by the United States Supreme Court. *Burton v. United States*, 534 U.S. 1171 (2002).

B. Burton's habeas petition based on ineffective assistance of counsel.

On February 20, 2003, Burton filed a 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The principal argument in Burton's motion was an ineffective assistance of counsel claim based on trial counsel's failure to object to a violation of the Interstate Agreement on Detainers, 18 U.S.C. App. 2.

Burtons' 28 U.S.C. § 2255 motion explained that Burton was transported from state prison in Kentucky to Tennessee on **November 23, 1998**. The 120 days allowed by Article IV(c) of the Interstate Agreement on Detainers thus expired on **March 22, 1999**. In an order entered on October 22, 1998, before Burton was transported to Tennessee, trial was scheduled in Burton's case for **January 19, 1999**. On

January 6, 1999, however, Burton's appointed trial counsel filed a motion for a continuance. (See App. 26). It is important to note that trial counsel's motion for a continuance did not specifically request a trial date past the March 22, 1999 expiration of the deadline under the Interstate Agreement on Detainers.

Two days after Burton's counsel filed his motion for a continuance, the trial court entered an order rescheduling Burton's trial date for **April 5, 1999**, two weeks *beyond* the deadline imposed by Article IV(c) of the Interstate Agreement on Detainers. (See App. 31). Burton's trial counsel did not object to or otherwise preserve for appellate review the trial court's selection of a trial date outside of the 120-day time limit.

It is important to note that on direct appeal, the Sixth Circuit had found that the district court violated four of five procedural requirements for granting a continuance outside of the 120-day time limit. *Burton v. United States*, 259 F.3d 503, 514 (6th Cir. 2001). The Sixth Circuit also noted that Burton's trial counsel had not waived Burton's right to a speedy trial under *New York v. Hill*, 528 U.S. 110 (2000). In its opinion, the Sixth Circuit stated:

> Because Burtons' counsel did not request a specific date, because the continuance was neither requested nor granted in open court, and because there has been no showing that the approximately three-month continuance was either "necessary" or "reasonable" for all

> parties within the meaning of the Agreement, we cannot conclude that Burton's mere request for a continuance amounted to an intentional abandonment of either Article IV(c)'s procedural safeguards or its substantive rights.

Id. at 516.

The Court then noted, however, that "because Burton did not object to the district court's failure to follow the five requirements for obtaining a continuance, we will review his claim for plain error." *Id.*

Burton's 28 U.S.C. § 2255 motion was based on his appointed counsel's failure to object to the violation of the Interstate Agreement on Detainers which resulted in the Sixth Circuit applying a plain error standard of review to the violation as opposed to an abuse of discretion standard of review. Burton argued that his appointed counsel's failure to object to the Interstate Agreement on Detainers violation was ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

The district court denied Burton's 28 U.S.C. § 2255 motion. *Burton v. United States*, No. 3:03-cv-124 (E.D. Tenn., May 23, 2007). (App. 3-25). The district court also denied a certificate of appealability on all issues and certified that an appeal would be frivolous and not taken in good faith and denied Burton *in forma pauperis* status on appeal. *Id.* Burton filed a notice of appeal, *pro se*, on June 22, 2007.

Burton requested the Sixth Circuit to grant a certificate of appealability on his claim that his appointed trial counsel was constitutionally ineffective for failing to preserve the meritorious claim that Burton's rights under the Interstate Agreement on Detainers were violated. By order entered on June 24, 2008, the Sixth Circuit denied Burton's request for a certificate of appealability. (App. 1). On November 18, 2008, the Sixth Circuit denied a Petition for a Panel Rehearing filed by Burton. (App. 34).

REASON FOR GRANTING THE WRIT

I. The Sixth Circuit's denial of Burton's application for a certificate of appealability conflicts with this Court's precedent on the showing required for a successful application for a certificate of appealability.

A. The standard for granting a certificate of appealability

In *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003), this Court stated that a certificate of appealability is a jurisdictional requirement for appeal of the denial of a habeas corpus petition. *Id.* When considering an application for a certificate of appealability, the appellate court should conduct an "overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The relevant inquiry is whether the district court's resolution of the petitioner's constitutional claims is "debatable

among jurists of reason." *Id.* Furthermore, the "statute [28 U.S.C. § 2253(c)] forbids" the full consideration of the factual or legal bases of the claims. *Id.*

B. It is "debatable among jurists of reason" whether Burton's trial counsel was constitutionally ineffective for not objecting to a "clear and obvious" violation of the Interstate Agreement on Detainers.

It is "debatable among jurists of reason" whether Burton's trial counsel was constitutionally ineffective when he asked for a continuance of the **January 19, 1999** trial date, but did not object when the district court failed to follow four of the five procedural requirements for granting a continuance outside of the 120 day time limit and scheduled the case for trial on **April 6, 1999**, two weeks beyond the Interstate Agreement on Detainers deadline of **March 22, 1999**.

The Sixth Circuit acknowledged, under a plain error standard of review, that the district court's action in granting the continuance was "clear and obvious error." *Burton v. United States*, 259 F.3d 503, 516 (6th Cir. 2001). The Court reached this conclusion after noting that four of five procedural requirements for a continuance were violated. *Id.* at 514.

The Sixth Circuit discussed the five requirements for obtaining a continuance under the Interstate Agreement on Detainers. Those requirements are that 1) the court must have competent jurisdiction; 2) the grant of the continuance must be in open court;

3) the defendant or his attorney must be present; 4) the movant must demonstrate good cause in open court; and 5) the length of the continuance must be reasonable or necessary. *Id.* at 513.

The United States acknowledged that the district court granted the continuance in violation of the second, third and fourth requirements of Article IV(c) by failing to grant the continuance for good cause shown in open court, with either Burton or his attorney present. *Id.* at 516. The Sixth Circuit further concluded that the fifth requirement was also violated because there was no record of the continuance being "reasonable" or "necessary." *Id.*

Burton's trial counsel did not object to the trial date violating the Interstate Agreement on Detainers or the district court's failure to follow the five requirements for obtaining a continuance. It is important to note that appointed counsel's motion for a continuance did not specifically request a trial date past the **March 22, 1999** deadline. (App. 26). In fact, there were approximately two months between the scheduled trial (**January 19, 1999**) and the deadline imposed by Article IV(c) of the Interstate Agreement on Detainers. Trial counsel's failure to object to the "clear and obvious" violation[1] had grave consequences for the standard of review applied by the Sixth Circuit on direct appeal:

---

[1] See *Burton v. United States*, 259 F.3d 503, 516 (6th Cir. 2001).

> Accordingly, because Burton did not object to the district court's failure to follow the five requirements for obtaining a continuance, we will review his claim for plain error.

Burton, 259 F.3d at 516.

Applying the plain error standard outlined in *United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998), the Sixth Circuit found that Burton had shown both that an error occurred and that the error was clear and obvious. *Burton*, 259 F.3d at 516. The Sixth Circuit also found, however, that Burton had failed to show that the error affected his substantial rights and that it seriously affected the fairness of the proceedings. *Id.*

It is apparent that trial counsel's failure to object to the violation of the Interstate Agreement on Detainers had a disastrous effect on the standard of review applied to "a clear and obvious error" made by the district court.

Strickland v. Washington, 466 U.S. 668, 687 (1984), requires that a habeas petitioner claiming ineffective assistance of counsel show deficient performance and prejudice. The first prong of the test, a showing of deficient performance, requires the claimant to show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. The second prong of the test, a showing of prejudice, requires the claimant to show that counsel's errors were so serious that there is a reasonable probability

that, but for counsel's unprofessional errors, the result would have been different. *Id.*, at 694.

Burton's claim of ineffective assistance of counsel arose from his appointed counsel's failure to object to a violation of the Interstate Agreement on Detainers which the Sixth Circuit found to be "clear and obvious." Various courts have addressed counsel's failure to object in the context of an ineffective assistance of counsel claim. In *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007), the court held that counsel's failure to object to improper expert testimony constituted deficient performance. In *Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001), the court held that counsel's failure to object to improper statements made by the prosecution during closing argument was ineffective assistance of counsel. In *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002), the court held that counsel's failure to object to improper jury instructions was ineffective assistance of counsel. Similarly, in *Gray v. Lynn*, 6 F.3d 265, 269-70 (5th Cir. 1993), the court held that counsel's failure to object to an improper jury instruction was ineffective assistance of counsel.

In *Davis v. Sec'y for the Dept. of Corr.*, 341 F.3d 1310 (11th Cir. 2003), the court held that counsel's failure to preserve an issue under *Batson v. Kentucky*, 476 U.S. 79 (1986), for appellate review was ineffective assistance of counsel. The Eleventh Circuit appears to have adopted an "outcome on appeal" approach in evaluating ineffective assistance of counsel claims where the allegedly deficient conduct resulted in failure to preserve an issue for appellate

review. See *Taylor v. United States*, 279 Fed. Appx. 368 (6th Cir. 2008).

Also, even if defense counsel's failure to object to obvious errors somehow can be characterized as trial strategy, merely labeling defense counsel's actions as "strategic" does not insulate them from review. See, e.g., *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996) (the Court noting that an attorney's performance is not protected from Sixth Amendment challenges simply by calling it "trial strategy." *Id.*, at 1389); *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (the Court stating that "certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *Id.*, at 586.). In *Jacobs v. Mohr*, 265 F.3d 407, 411 (6th Cir. 2001), the court stated:

> Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law, and must, conscientiously protect his client's interest, undeflected by conflicting considerations, and defense counsel must investigate all apparently substantial defenses available to the defendant, and must assert them in the proper timely manner.

It is "debatable among jurists of reason" whether Burton's appointed trial counsel's representation fell below an objective standard of reasonableness. As stated above, Burton's trial counsel asked for a continuance of the **January 19, 1999** trial date and he did not object when the district court scheduled the

case for trial on **April 6, 1999**, two weeks *beyond* the Interstate Agreement on Detainers deadline of **March 22, 1999**. In fact, he did not even bring the Interstate Agreement on Detainers violation to the Court's attention, which would have presumably prompted the Court to adhere to the five requirements for granting a continuance outside of the Interstate Agreement on Detainers time period. See *Burton*, 259 F.3d at 513.

Trial counsel's failure to object to an error the Sixth Circuit described as "clear and obvious"[2] is representation below an objective standard of reasonableness. It is difficult to imagine a more "ill-chosen"[3] strategy than abandoning a right guaranteed to a criminal defendant, either through inattention or ignorance of the law on the part of defense counsel.

It is also "debatable among jurists of reason" whether Burton can show prejudice resulting from his trial counsel's deficient performance. Prejudice, according to *Strickland*, is simply a reasonable probability of a different outcome absent counsel's errors. *Strickland*, 466 U.S. at 694. There is a "reasonable probability" that Burton's sentence would have been vacated if his trial counsel had made an objection to

---

[2] See *Burton*, 259 F.3d 503 at 516.

[3] See *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983) (the Court stating that "certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *Id.*, at 586.).

the district court scheduling the trial outside of the 120 day time period without following the necessary procedural requirements.

In *Alabama v. Bozeman*, 533 U.S. 146 (2001), this Court gave a strict interpretation to the requirements of the Interstate Agreement on Detainers. In *Bozeman*, the Court considered whether Article IV of the Interstate Agreement on Detainers included an "implicit exception" to the literal language of the law requiring dismissal of the indictment for a violation of the Interstate Agreement on Detainers. *Id.* at 153-54. Rejecting the state's "harmless error" analysis argument, the Court explained that the "language of the Agreement militates against an implicit exception, for it is absolute. . . . The word 'shall' is ordinarily the 'language of command.'" *Id.* at 154. The *Bozeman* court held that Article IV barred further proceedings against a defendant even in situations where the defendant's imprisonment is interrupted briefly, even a single day. *Id.* at 149. In other words, there is no exception for a *de minimus* violation of the Act. *Id.* at 152.

If Burton's trial counsel had objected to the violation of the Interstate Agreement on Detainers it would have created a "reasonable probability of a different outcome" under *Strickland*. First, the *Bozeman* court made it clear that any violation of the Interstate Agreement on Detainers, however slight, requires literal application of the Agreement's substantive provisions. *Bozeman*, 533 U.S. at 149. Second, and most important, counsel's failure to object to

the violation of the Interstate Agreement on Detainers prevented Burton from receiving a more lenient standard of review.

In *United States v. White*, 185 Fed. Appx. 504, 507 (6th Cir. 2006), the Sixth Circuit stated that it generally reviews a district court's denial of a motion to dismiss an indictment under an abuse of discretion standard. The Court noted, however, that no cases from the Sixth Circuit had specifically addressed the standard of review on a motion to dismiss based on the Interstate Agreement on Detainer's speedy clock provision. *Id.* The Court noted that other jurisdictions had reviewed legal conclusions made by the district court under a *de novo* standard, factual findings under a clear error standard, and the district court's ultimate ruling under an abuse of discretion standard. *Id.* (citing *United States v. Paredes-Batista*, 140 F.3d 367, 374 (2nd Cir. 1998); *United States v. Kelley*, 402 F.3d 39, 41 (1st Cir. 2005)).

The district court's granting of a continuance does not appear to have been based on any legal conclusions or factual findings. Therefore, it appears that the district court's action in granting the continuance would have likely been reviewed under an abuse of discretion standard if a proper objection had been made by Burton's trial counsel. An abuse of discretion is defined "as a definite and firm conviction that the trial court committed a clear error of judgment." *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002).

As discussed above, this Court found on direct appeal, under a plain error standard of review, that Burton had shown both that the district court's granting of the continuance was error and that the error was clear and obvious. *Burton*, 259 F.3d at 516. However, the Court felt that Burton failed to show, as required under the plain error standard of review, that the error also affected his substantial rights and that it seriously affected the fairness of the proceedings. *Id.* The Court specifically stated in its opinion that it was reviewing the district court's action under a plain error standard of review because Burton had failed to make an objection to the continuance. *Id.*

It is apparent that if Burton's trial counsel had made an objection to the continuance, the district court's granting of the continuance would have been reviewed under an abuse of discretion standard. Given the fact that the Sixth Circuit, on direct appeal, found the district court's action in granting the continuance to be a clear and obvious error, it is axiomatic that the Court would have likewise viewed the district court's action with "a definite and firm conviction that the trial court committed a clear error of judgment" under the abuse of discretion standard.

If the Sixth Circuit had found that the district court abused its discretion in granting the continuance, it would have had no choice but to vacate Burton's sentence due to this Court's statement in *Alabama v. Bozeman* that there is no such thing as a *de minimis* violation of the Interstate Agreement on Detainers. Therefore, if Burton's trial counsel had

made an objection to the continuance, there would have been a "reasonable probability of a different outcome" under *Strickland*. It is "debatable among jurists of reason" under *Miller-El v. Cockrell*, 537 U.S. 322 (2003) whether Burton can show prejudice resulting from his trial counsel's error.

CONCLUSION

The foregoing demonstrates that it was "debatable among jurists of reason" whether Burton could succeed on his claim of ineffective assistance of counsel. The Sixth Circuit was, therefore, in error for not granting a certificate of appealability pursuant to *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Respectfully submitted,

NUNERY & BENNETT, PLLC
105 East Main Street
Campbellsville, KY 42718
Telephone: (270) 789-2466
Facsimile: (270) 789-0709

No. 07-5803

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES W. BURTON, Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA, Respondent-Appellee.	)	(Filed Jun. 24, 2008)

Charles W. Burton, a federal prisoner proceeding through counsel, appeals a district court order denying his motion to vacate, set aside or correct sentence filed pursuant to 28 U.S.C. § 2255. Burton requests a certificate of appealability pursuant to Fed. R. App. P. 22(b).

In a 1999 bench trial, the district court found Burton guilty of numerous counts related to an armed robbery of a pharmacy. The court sentenced him to 562 months' imprisonment followed by six years' supervised release. Subsequently, the district court amended Burton's sentence to credit him for 650 days during which he awaited trial. In 2001, this court affirmed Burton's convictions, but remanded the case "with instructions to reinstate Burton's original sentence." *United States v. Crozier*, 259 F.3d 503 (6th Cir. 2001). The United States Supreme Court denied Burton's petition for a *writ* of *certiorari*.

In his § 2255 motion, Burton raised numerous issues involving the ineffective assistance of counsel, The district court denied relief on the merits and denied Burton a certificate of appealability. Burton now seeks a certificate of appealability from this court only on his claim that his trial counsel was ineffective for failure to "preserve the meritorious claim that [his] rights under the Interstate Agreement on Detainers were violated."

An individual seeking a certificate of appealability is required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Burton has failed to make such a showing and therefore the application for a certificate of appealability is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES W. BURTON,	)	
Petitioner-Appellant,	)	
	)	3:03-cv-124
v.	)	3:97-cr-154
UNITED STATES OF AMERICA,	)	*Jarvis*
	)	
Respondent-Appellee.	)	

JUDGMENT ORDER

(Filed May 23, 2007)

In accordance with the accompanying Memorandum Opinion, the motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and this action is **DISMISSED**. All other pending motions are **DENIED** as **MOOT**. Should the petitioner give timely notice of an appeal from this decision, such notice will be treated as an application for a certificate of appealability, which under the circumstances is **DENIED**. The court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this court hereby **DENIES** the petitioner leave to proceed *in forma pauperis* on appeal.

ENTER:

s/ James H. Jarvis
United States District Judge

ENTERED AS A JUDGMENT
s/ Patricia L. McNutt
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CHARLES W. BURTON	)	
Petitioner,	)	
v.	)	3:03-cv-124
	)	3:97-cr-154
UNITED STATES OF AMERICA	)	*Jarvis*
	)	
Respondent.	)	

MEMORANDUM OPINION

(Filed May 23, 2007)

This is a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. For the following reasons, the § 2255 motion will be **DENIED** and this action will be **DISMISSED**. All other pending motions will be **DENIED** as **MOOT**.

I. Standard of Review

This court must vacate and set aside petitioner's conviction upon a finding that "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255. To prevail under § 2255, petitioner "must show a 'fundamental defect which inherently results in a complete miscarriage of justice,' or, an error so egregious that it amounts to a violation of due process." *United States v. Ferguson*,

918 F.2d 627, 630 (6th Cir. 1990) (quoting *Hill v. United States,* 368 U.S. 424, 428 (1968)).

Under Rule 8 of the Rules Governing Section 2255 Proceedings In The United States District Courts, the court is to determine after a review of the answer and the records of the case whether an evidentiary hearing is required. If the motion to vacate, the answer and the records of the case show conclusively that petitioner is not entitled to relief under § 2255, there is no need for an evidentiary hearing. *Baker v. United States,* 781 F.2d 85, 92 (6th Cir. 1986).

II. Factual Background

Petitioner and co-defendant, David E. Crozier, were charged, in a nine-count second superseding indictment, of the following: conspiracy to distribute and possess with intent to distribute various controlled substances (count one); armed robbery of a pharmacy (count two); using and carrying a firearm during and in relation to a crime of violence (count three); being a felon in possession of a firearm (count four referred to petitioner and count five referred to Crozier); possession with intent to distribute Schedule II controlled substances (count six); possession with intent to distribute a Schedule III controlled substance (count seven); possession with intent to distribute a Schedule IV controlled substance (count eight); and using and carrying a firearm during and in relation to a drug trafficking crime (count nine).

[Criminal Action No. 3:97-cr-154, Court File No. 71, Second Superseding Indictment].

Following a bench trial, petitioner was found guilty on all charges against him and was sentenced as a career offender to a term of imprisonment of 562 months. His conviction was affirmed on direct appeal. *United States v. Crozier,* 259 F.3d 503 (6th Cir. 2001), *cert. denied,* 534 U.S. 1149 (2002). The Sixth Circuit summarized the evidence against the defendants, with reference to discrete criminal activities, as follows:

> 1. The Tennessee Rite-Aid Robbery
>
> On November 26, 1995, two armed gunmen robbed the Rite-Aid Drug Store in Clinton, Tennessee, and absconded with numerous pharmaceutical drugs, including Schedule II, Schedule III, and Schedule IV controlled substances. During the robbery, one of the robbers (later identified as Burton) repeatedly asked Katrina DeBusk, the Rite-Aid pharmacist, about the location of several drugs, including Dilaudid pills and morphine. Several days after the robbery, DeBusk helped police prepare a composite sketch of the first suspect in about fifteen minutes. Police worked on a composite of the second suspect (again, later identified as Burton) for approximately three hours but failed to produce a sketch satisfactory to DeBusk.
>
> Approximately one month later, DeBusk and Shelly Simonds, the only other Rite-Aid

employee present during the robbery, separately identified Burton as one of the robbers from a photographic line-up. The Clinton Police Department, which uses black-and-white mug shots, had obtained Burton's photograph from the Lexington, Kentucky, Police Department, which uses color mug shots. Accordingly, Burton's photograph was the only color photograph shown to the witnesses. On March 6, 1998, both witnesses again identified Burton as the perpetrator, this time from a live line-up. Burton was the only person represented in both the photo line-up and the live line-up.

Although neither witness was able to identify Crozier as Burton's accomplice during the robbery, Crozier's brother-in-law, Richard Randolph, testified at trial that in early December, Crozier showed him a bag containing bottles of pharmaceutical drugs and told him that Crozier and Burton had obtained the drugs by robbing a Tennessee drugstore.

2. The Kentucky Drug Sales

In late November or early December 1995, in Lexington, Kentucky, Clayton Hobbs arranged for Burton to sell some drugs to Christopher Tucker. Hobbs drove Burton and an unidentified third man in a small car to Tucker's shop where Burton sold Tucker two boxes of pharmaceutical drugs. Tucker gave Burton $1,800 in one-hundred dollar bills.

Tucker was unable to identify Crozier as the third man.

The next day, as previously agreed, Burton and Hobbs returned to Tucker's shop, where Tucker gave Burton an additional one thousand dollars in one-hundred dollar bills. Tucker testified that this time, Burton and Hobbs were in a Cadillac Eldorado. On December 1, Burton paid six hundred dollars cash to a pawn shop for his previously-pawned Cadillac Eldorado. The United States thus argues that although Tucker could not recall the exact date of the drug sale, the drugs must have been sold on November 30, with the follow-up payment occurring on December 1.

3. Casing the Lexington, Kentucky, Rite-Aid

At approximately 4 p.m. on December 1, security personnel for the Rite-Aid Drug Store in Lexington observed Burton and Crozier enter the store together, walk around separately, and eventually meet up at the pharmacy. Burton made a purchase and left the store, only to return a short time later, stay awhile, then leave. Burton again returned and after fifteen or twenty minutes, met up with Crozier. The two split up again, ultimately leaving the store separately. A short while later, Burton again returned, and spent approximately five minutes paying particular attention to the cash registers' and employees' locations. Crozier also re-entered

the store but remained near the front. Burton finally ended this episode by placing a Tylenol bottle in his pocket. When confronted by security, a fight ensued, resulting in Burton's arrest and Crozier fleeing the scene. Police found syringes, $1,557 in cash (including fifteen one-hundred dollar bills), and a number of Dilaudid pills on Burton. Shortly after Burton's arrest, his girlfriend pawned two handguns, one of which matched the description DeBusk had given of the gun she saw during the Tennessee Rite-Aid robbery.

On December 6, police officers executed a parole violation warrant on Burton. It was while Burton was being held on that charge that the Lexington Police Department forwarded Burton's color mug shot to the Clinton Police Department in Tennessee. Burton remained incarcerated for parole violations for the remaining time relevant to this appeal.

4. The Somerset, Kentucky, Drugstore Burglary

On February 8, 1996, Randolph and Crozier's son, Brett, burglarized a Somerset, Kentucky, drugstore and brought the drugs to Crozier. Some of those drugs were then taken to Clayton Hobbs, while Crozier, Randolph, and a man named Charlie Henderson sold the morphine obtained in the burglary to someone in Georgetown, Kentucky, for one thousand dollars.

> During the time relevant to this appeal, Crozier was living on Limestone Street in Somerset, while Crozier's wife lived on White Street. Although Crozier often visited and occasionally stayed overnight at his wife's home, he maintained his own residence. On February 12, police officers executed search warrants at both the Limestone Street and White Street residences. The search of Crozier's Limestone Street residence revealed one bottle of pharmaceutical drugs and a ledger reflecting indebtedness to Crozier by Burton for one thousand dollars, and by "Clayton" for eight hundred dollars. The search of Crozier's wife's White Street residence revealed two bags containing a large number of pharmaceutical drugs in wholesale-sized bottles, and eight-hundred forty-five dollars in Crozier's wallet. Some of those bottles were traceable to the Somerset drugstore and others were consistent with drugs taken during the Tennessee Rite-Aid robbery. Although Crozier was present at the White Street address during the search, Crozier's fingerprints were not found on any of the seized booty.

Id. at 507-09.

In support of his § 2255 motion to vacate sentence, petitioner alleges numerous instances of ineffective assistance of counsel. He also alleges the cumulative effect of counsel's errors as a basis for relief.

III. Discussion

A. Ineffective Assistance of Counsel

In *Strickland v. Washington,* 466 U.S. 668 (1984) the United States Supreme Court established a two-part standard for evaluating claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

To establish that his attorney was not performing "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson,* 397 U.S. 759, 771 (1970), petitioner must demonstrate that the attorney's representation "fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. at 687-88. In judging an attorney's conduct, a court should consider all the circumstances and facts of the particular case. *Id.* at 690. Additionally, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)).

The issue is whether counsel's performance "was so *manifestly* ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow,* 977 F.2d 222, 229 (6th Cir. 1992) (*en banc*). Because he is seeking relief under § 2255, petitioner bears the burden of proving by a preponderance of the evidence that his counsel was deficient. *See Pough v. United States,* 442 F.3d 959, 964 (6th Cir. 2006). As noted, petitioner alleges several instances of ineffective assistance of counsel, each of which the court will consider in turn.

1. Failure to object to violation of Interstate Agreement on Detainers.

Although petitioner was originally brought to the Eastern District of Tennessee from the Kentucky prison where he was incarcerated pursuant to a writ of habeas corpus ad prosequendum, he was returned to Kentucky pending trial and the United States subsequently filed a detainer with the Kentucky prison. Petitioner was then brought back to this jurisdiction pursuant to a second writ of habeas corpus ad prosequendum. For that reason, the Interstate Agreement on Detainers (IAD), 18 U.S.C. App. 2, came into play. *See United States v. Mauro,* 436 U.S. 340, 349 (1978) ("[W]e hold that the United States is bound by the [Interstate Agreement on

Detainers Act] when it activates its provisions by filing a detainer against a state prisoner and then obtains his custody by means of a writ of habeas corpus *ad prosequendum.*").

Approximately one week prior to trial, counsel for petitioner filed a motion to dismiss based upon the government's violation of the IAD. [Criminal Action No. 3:97-cr-154, Court File No. 140]. In the supporting Memorandum, counsel argued that petitioner did not receive the requisite 30-day notice in order to contest the government's request for custody, as provided in 18 U.S.C. App. 2, Art. IV(a). [*Id.*, Court File No. 141]. The court denied the motion. [*Id.*, Court File No. 148, Minutes of motion hearing; Court File No. 221, Transcript of motion hearing, p. 32].

On direct appeal, petitioner again alleged his rights under the IAD had been violated and that his indictment should be dismissed. The basis of that argument was the speedy trial provision of the IAD. 18 U.S.C. App. 2, Art. IV(c). The Sixth Circuit first summarized when the United States is bound by the IAD and the relevant requirements of the Agreement:

> The Interstate Agreement is a compact entered into by forty-eight states, the United States, and the District of Columbia to establish procedures for resolution of one jurisdiction's outstanding charges against another jurisdiction's prisoner. A detainer "is simply a notice to prison authorities that charges are pending against an inmate elsewhere, requesting the custodian to notify the sender

> before releasing the inmate." The United States need not file a detainer in order to obtain custody over a state's prisoner. Thus, it is not necessarily bound by the Interstate Agreement on Detainers' requirements. If the United States chooses to file a detainer, however, the Agreement's requirements attach.
>
> Once the United States has filed a detainer with another jurisdiction and has made a written request for temporary custody of the defendant, Article IV of the Agreement imposes two significant requirements: (1) trial on the charges must commence within one hundred twenty days of the arrival of the prisoner into federal custody (the "speedy trial" provision); and (2) disposition of the pending charges must precede the return of the prisoner from federal to state custody (the "anti-shuttling" provision).

United States v. Crozier, 259 F.3d at 513 (quoting *Ridgeway v. United States,* 558 F.2d 357, 360 (6th Cir. 1977)) (other citations omitted).

Petitioner specifically argued on appeal that he was not tried within 120 days of the date of his arrival in this jurisdiction. The issue arose as a result of petitioner's motion to continue the trial date, which the court granted by written order only. The IAD specifically provides that "for good cause shown in open court, the prisoner or his counsel being present," a court "may grant any necessary or reasonable

continuance" beyond the 120-day deadline. 18 U.S.C. App. 2, Art. IV(c).

The Sixth Circuit found that the district court violated the requirements of Article IV(c) "by failing to grant the continuance for good cause shown in open court, with either Burton or his attorney present." 259 F.3d at 514. Nevertheless, because petitioner did not object to the court's failure to literally comply with the requirements of Article IV(c) for obtaining a continuance, the Sixth Circuit reviewed his claim under a plain error analysis.

> To establish plain error, a defendant must show "(1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings."

Id. at 516 (quoting *United States v. Koeberlein,*. 161 F.3d 946, 949 (6th Cir. 1998)).

The Sixth Circuit determined that petitioner had "shown both that an error occurred at the district court and that the error was clear and obvious, the first two prongs of the 'plain error' test." *Id.* The Court concluded, however, that petitioner "failed to show that the error also affected his substantial rights and that it seriously affected the fairness of the proceedings (prongs three and four of the 'plain error' test)." *Id.* Petitioner had argued that he was not

required to demonstrate prejudice as a result of the IAD violation, but the Sixth Circuit disagreed.

> Although we read the Agreement as mandating reversal when the district court fails to literally comply with Article IV(c)'s procedural requirements in response to the *government's* request for a continuance, we see nothing arbitrary about requiring a showing of prejudice when the speedy trial violation arose as a result of the *defense's* motion for a continuance.

Id.

Petitioner now alleges that his trial attorney's failure to object to the court's violation of the IAD and the attorney's failure to preserve the error for appellate review constituted ineffective assistance of counsel. Petitioner argues that the failure to object was a clear and obvious error. He further argues that had counsel properly objected to the IAD violation, the charges would have been dismissed by the trial court, or the issue at least preserved for appellate review and the charges then dismissed by the Sixth Circuit. In addition, petitioner also claims that, had he been informed in advance of the motion to continue, he would have objected to the continuance sought by his trial counsel.

Petitioner was originally represented by Elizabeth B. Ford, with the Federal Defender Services of Eastern Tennessee, Inc. With trial set for less than three months away, Ms. Ford was allowed to

withdraw from representation and James A.H. Bell was appointed to represent petitioner. Mr. Bell is, and was at the time, a very competent, very well-respected criminal defense attorney.

This was a complicated case, involving complex expert testimony and eye witness [sic] identification. Mr. Bell moved to continue the trial date based upon his opinion that further investigation was necessary to adequately prepare for trial and thus protect petitioner's right to the assistance of competent counsel. In addition, Mr. Bell was expecting the birth of his child between the date his motion was filed and the trial date. Given those circumstances and the fact that he would be absent from his office for several days, Mr. Bell again felt he would not have time to adequately prepare for trial.

The court granted the motion to continue, specifically finding the continuance necessary to protect petitioner's right to the assistance of competent counsel. [Criminal Action No. 3:97-cr-154, Court File No. 113, Order granting motion to continue, pp. 1-3]. The court also observed that there were key issues to be adjudicated before trial, namely procedural and substantive arguments regarding the *Daubert*[1] issues, and that the court would be hard-pressed to fully adjudicate the issues prior to the upcoming trial date. [*Id.* at 2].

---

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Under the circumstances of this case, Mr. Bell rendered effective assistance of counsel by requesting a continuance of the trial date. In fact, it could be argued that it would have been error had Mr. Bell *not* sought a continuance. Mr. Bell clearly needed the additional time to adequately prepare for a complex trial. Having moved for additional time to prepare for trial, it would have been disingenuous for him to then move to dismiss as a result of the continuation of the trial date. Accordingly, the court finds that Mr. Bell's performance in this regard was not deficient.

In addition, petitioner cannot demonstrate that he was prejudiced by Mr. Bell's conduct. As noted, petitioner benefitted from the continuance of the trial date by allowing his attorney adequate time to prepare for trial in a complex and complicated case, undistracted by the impending birth of a child. As the Sixth Circuit found, petitioner's "substantial rights" were not violated, 259 F.3d at 516, nor was the "fairness of the proceedings" affected. *Id.* Petitioner has therefore failed to satisfy either prong of the standard set forth in *Strickland.*

2. Failure to locate, interview, and present testimony of Albert Clayton Hobbs.

Petitioner alleges his attorney failed to locate, interview, and present the testimony of Albert Clayton Hobbs. According to petitioner, Hobbs would have

impeached an essential prosecution witness, specifically Chris Tucker.

Chris Tucker testified that he first met petitioner when Clayton Hobbs brought petitioner to Tucker's shop so that Tucker could purchase drugs from petitioner. [Criminal Action No. 1:97-cr-154, Court File No. 177, Transcript of Proceedings, pp. 175-77]. Tucker also testified that when he arrived at his shop, Hobbs and petitioner were sitting in Hobbs' car, mixing up dope in order to shoot it up. [*Id.* at 177-79]. Tucker further testified that he purchased narcotics from petitioner and that Hobbs drove petitioner back to the shop the next day to get the rest of the money owed him for the drugs. [*Id.* at 179-82]. Tucker finally testified that he was told by Hobbs that the narcotics he purchased came from a drug store robbery that petitioner had committed.

In support of his position, petitioner has now submitted Hobbs' affidavit, in which he testifies that he is a long-time acquaintance with petitioner and that at no time did he go with petitioner to the residence of Chris Tucker. Mr. Hobbs also denies going to Tucker's residence to sell drugs and denies making the statement about drugs coming from a drug store. According to Hobbs, he was not interviewed by petitioner's trial attorney, but had he been, he would have told counsel the foregoing. Hobbs also states that, during the trial of this case, he was incarcerated in the Fayette County, Kentucky, Detention Center, and would have testified truthfully if subpoenaed to testify at petitioner's trial. [Court File No. 2,

Memorandum of Law in Support of Motion to Vacate Sentence, Appendix 4, Affidavit of Albert Clayton Hobbs].

Hobbs' value as a defense witness is questionable. Hobbs would not have been an alibi witness for petitioner, but rather a witness to impeach Tucker's testimony. As such, Hobbs would have been subject to impeachment himself. Hobbs' name ("Clayton") was on a ledger taken during the search of co-defendant Crozier's residence; the ledger showed "Clayton" owed Crozier $800. *United States v. Crozier,* 259 F.3d at 509. Crozier's brother-in-law, Richard Randolph, testified that Hobbs bought some of the drugs Randolph stole from the Somerset, Kentucky, drugstore. *Id.* In addition, Randolph corroborated Tucker's testimony that he was told the narcotics he purchased came from a drug store: Randolph testified at trial that Crozier had bragged to him about robbing a Tennessee pharmacy with petitioner. *Id.* at 508.

As Hobbs himself admits, he was in custody at the time of petitioner's trial. For that reason, and based upon the foregoing, Hobbs would not have made a very credible witness. Moreover, Hobbs' statement that he would have testified is also a questionable assertion. Based upon the testimony of other witnesses, Hobbs himself might have been charged in the drug conspiracy. Under the circumstances, it does not appear that the decision of petitioner's attorney to not pursue Clayton Hobbs as a witness was an unreasonable trial strategy. This claim of ineffective assistance of counsel lacks merit.

See United States v. Pierce, 62 F.3d 818, 833 (6th Cir. 1995) (failure to present potential witnesses who are cumulative, or unreliable and subject to impeachment, does not constitute ineffective assistance of counsel).

3. Failure to object to improper chain of custody for drug evidence.

Petitioner alleges his attorney should have objected to the admission of the evidence seized at the White Street residence, which included drugs and non-drug material. He bases his challenge on the fact that Agent Chris Hacker testified that the drugs were seized on February 10, 1996, although the search warrants were not issued until February 12, 1996. Agent Hacker testified that, on February 12, 1996, he assisted in collecting evidence after the execution of three search warrants. [Criminal Action No. 1:97-cr-154, Court File No. 178, Transcript of Proceedings, pp. 169-71]. When asked about a certain bag with writing on it, which contained items taken from the White Street residence, Agent Hacker testified it was his writing and noted that the date of recovery was "2-10-96." [*Id.* at 173]. Petitioner claims the evidence was subject to suppression based upon this testimony.

Agent Hacker specifically testified, however, that he collected the evidence after the execution of the search warrant and petitioner's arrest. [*Id.* at 171]. In addition, Douglas Ralph Nelson, a detective with the Somerset Police Department, testified that he

participated in the execution of three search warrants on February 12, 1996, including that of the White Street residence. [Criminal Action No. 1:97-cr-154, Court File No. 178, Transcript of Proceedings, pp. 137-38].

Agent Hacker's error, whether in his testimony or in his writing on the evidence bag, is not material. Accordingly, any motion to suppress the evidence seized at the White Street residence would have been frivolous. Petitioner has failed to state a claim of ineffective assistance of counsel in this regard. *United States v. Hanley,* 906 F.2d 1116, 1121 (6th Cir. 1990) (failure of defense counsel to pursue frivolous motions and objections cannot constitute ineffective assistance of counsel).

4. Failure to object to the admission of an altered videotape.

Petitioner alleges his attorney failed to object to the admission of the surveillance videotape from the Kentucky Rite-Aid and failed to object to the prosecution's reliance on the videotape. Petitioner alleges the videotape should not have been admitted into evidence because it had been spliced for training purposes by Kentucky Rite-Aid security officers. The claim that the videotape was altered goes to the weight to be accorded the evidence, not to the admissibility of the evidence. Therefore, petitioner's attorney did not render ineffective assistance of counsel by failing to object to the admission of the videotape.

Based upon the foregoing, petitioner has failed to demonstrate ineffective assistance of counsel under the standard established by the Supreme Court in *Strickland.*

B. Cumulative Errors

Petitioner alleges that he is entitled to relief based upon the cumulative effect of trial counsel's errors, which was sufficient to deny him a fundamentally fair trial. The Sixth Circuit has held that, regardless of whether each of a petitioner's alleged errors, standing alone, would require a finding of deprivation of due process, a court may look to whether the cumulative effect of the errors was such that the petitioner was denied fundamental fairness. *See, e.g., Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988); *Walker v. Engle,* 703 F.2d 959, 968 (6th Cir. 1983).

This presupposes, of course, that there was error during the criminal proceedings. Since petitioner's allegations of error lack merit, a cumulative error analysis is not appropriate. *See Derden v. McNeel,* 978 F.2d 1453 (5th Cir. 1992) (*en banc*). "[A]ny cumulative error theory must refer only to errors committed in the state trial court. A habeas petitioner may not just complain of unfavorable rulings or events in the effort to cumulate errors." *Id.* at 1458. *See also United States v. Rivera,* 900 F.2d 1462, 1471 (10th Cir. 1990) ("cumulative-error analysis should

evaluate only the effect of matter determined to be in error, not the cumulative effect of non-errors.").

IV. Conclusion

Petitioner is not entitled to relief under § 2255 and his motion to vacate, set aside or correct sentence will be **DENIED**. This action will be **DISMISSED**. In addition to the above, this court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this court will **DENY** petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

AN APPROPRIATE ORDER WILL ENTER.

s/ James H. Jarvis
United States District Judge

Exhibit 28
page 1 of 4

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
vs.	:	No. 97-CR-154
CHARLES W. BURTON	:	
Defendant.	:	

MOTION FOR CONTINUANCE

Comes the defendant, Charles W. Burton, by and through counsel, hereby respectfully requests that the trial of this matter be continued from its present date of January 19, 1999, until such time as is convenient for the Court and all parties. In support of this Motion, the Defendant would state as follows:

1. The undersigned counsel for Defendant Burton was appointed to represent this defendant on October 21, 1998.

2. This case was initiated by the filing of the indictment on December 17, 1997. Defendant Burton was initially represented by Elizabeth B. Ford of the Federal Defender Services of East Tennessee.

3. Since being counsel for Defendant, the undersigned has diligently pursued both the necessary investigation into this case and attempted to get up to speed on the rather complex expert witness identification issues in this case.

4. Counsel for the Defendant is presently having further investigation, beyond that done by the Federal Defender Services of East Tennessee, undertaken into this case. It is the opinion of counsel for the Defendant that this further investigation is necessary to protect the Defendant's rights to the competent assistance of counsel in order to adequately prepare for the trial of this matter.

5. Furthermore, as has been relayed to this Court, the undersigned counsel's wife is expecting their child some time between January 1 and the trial date. Counsel foresees that he will be absent from the office on some days for some time during and around the birth of this child.

6. For the foregoing reasons, counsel for the Defendant would request this Court grant additional time in order to allow adequacy to prepare for this trial. It is the opinion of the undersigned counsel that, due to the continued investigation and the impending birth that the undersigned will not have sufficient time to adequately prepare for the trial of this matter.

Respectfully submitted this the _____ day of _____, 199_.

/s/ [Illegible]_____
James A.H. Bell, Esq.
B.P.R. No. 775
110 W. Summit Hill Drive
Knoxville, TN 37902
(423) 637-2900

CERTIFICATE OF SERVICE

I, James A. H. Bell, Attorney for Defendant, hereby certify that I have this date forwarded a true and exact copy of the foregoing pleading to the United States Attorney's Office for Knox County, Tennessee, as well as counsel for co-defendant Crozier.

/s/ [Illegible]_____
JAMES A. H. BELL

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
	:	No. 97-CR-154
vs.	:	
CHARLES W. BURTON	:	
Defendant.	:	

AFFIDAVIT

Comes the Affiant, after being duly sworn, and would state as follows:

1. My name is James A.H. Bell.

2. I am an attorney licensed to practice before the Courts of the State of Tennessee and the United States District Court for the Eastern District of Tennessee. I am representing Defendant Charles Burton by appointment under the Criminal Justice Act.

3. In preparing the trial of this matter, it has come to my attention that additional investigation needs to be done. I intended to have that investigation done. I have had difficulty obtaining an investigator. The individuals I and my office normally use, including the investigator I intend to use on this matter, are currently involved in other matters, ranging from investigating for the defense of Byron

Looper and for the defense of Thomas D. Huskey, both prominent cases in Tennessee State Courts.

4. It is my professional opinion that the needed investigation cannot be undertaken and successfully completed in the time left before trial.

I have read the attached Motion for Continuance, and know the factual statements contained therein are true.

FURTHER AFFIANT SAITH NOT.

/s/ [Illegible]
JAMES A.H. BELL

Sworn to and subscribed before me
this 6 day of Jan, 1999.

/s/ [Illegible]
NOTARY PUBLIC
My Commission Expires: Dec. 5, 2000

Exhibit 29
page 1 of 3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	)	
	)	No. 3:97-cr-154
v.	)	
	)	
CHARLES WILLIAM BURTON and DAVID CROZIER	)	
	)	

ORDER

This matter is presently before the court on the motion for continuance [Doc. 112] filed by defendant Charles W. Burton. Neither the government nor the co-defendant has any objection to Mr. Burton's motion.[1]

Mr. Burton's motion has two grounds. First, Mr. Burton's counsel believes that additional investigation is necessary to protect the defendant's right to competent assistance of counsel in order to fully prepare for the trial of this matter. It must be

[1] During a telephonic conference on January 6, 1999, Steven H. Cook, AUSA, and Michael P. McGovern, attorney of record for Mr. Crozier, advised both Clifford A. Rodgers, law clerk to the undersigned, and James A. H. Bell, attorney of record for Mr. Burton, as to the government's and Mr. Crozier's positions on this issue.

emphasized that Mr. Burton was originally represented by Elizabeth B. Ford, who is with Federal Defender Services of East Tennessee, and that she was recently replaced by Mr. Burton's current counsel, James A. H. Bell, on October 21, 1998 [*see* Doc. 88]. Second, Mr. Bell represents that he is presently expecting the birth of a child sometime between the date of his motion and the trial date and will therefore be absent from his office for several days, which absence precludes his ability to adequately prepare this case for trial.

In addition to Mr. Bell's representations, the record reflects that there is a key issue which must be adjudicated before trial. In particular, there is presently pending the government's objections to the memorandum and order [Doc. 95] filed by the Honorable Robert P. Murrian, United States Magistrate Judge, on November 17, 1998. The government's objections set forth both procedural and substantive arguments regarding the so-called *Daubert* issues[2] discussed and analyzed by Judge Murrian. The court observes that it would be hard pressed to fully adjudicate the issues raised by the government's objections before the current trial date of January 19, 1999.

Therefore, based on the above representations of counsel, as well as the entire record in this case, the

---

[2] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

court hereby GRANTS Mr. Burton's motion for continuance [Doc. 112] whereby the trial of this case is CONTINUED from January 19, 1999, to **April 5, 1999**. In granting this continuance, the court specifically finds that the ends of justice served by the granting of this continuance outweigh the best interests of the public and both defendants in a speedy trial. *See* 18 U.S.C. § 3161(h)(8)(A). In particular, the court finds that the failure to grant this continuance would not only result in a miscarriage of justice, *see id.* § 3161(h)(8)(B)(i), but would also deny counsel for Mr. Burton the reasonable time necessary for effective trial preparation, taking into account the exercise of due diligence. *See id.* § 3161(h)(8)(B)(iv). Thus, the court finds that the time from the filing of defendant's motion to continue (January 6, 1999) and the new trial date (April 5, 1999) is fully excludable pursuant to the Speedy Trial Act.

Additionally, the court hereby DECLARES that all subpoenas previously issued by either the government or the defendants for the previous trial date are in full force and effect for the new trial date. The court hereby DIRECTS the parties to mail a copy of this order to any Witnesses under the previous subpoenas.

ENTER:

/s/ J.H. Jarvis
James H. Jarvis,
UNITED STATES
DISTRICT JUDGE

No. 07-5803

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES W. BURTON, Petitioner-Appellant,	)	ORDER
v.	)	(Filed Nov. 17, 2008)
UNITED STATES OF AMERICA, Respondent-Appellee.	)	

Before: BOGGS, Chief Judge; MERRITT and GRIFFIN, Circuit Judges.

Charles W. Burton, a federal prisoner proceeding through counsel, has filed a petition for rehearing of this court's order, filed on June 24, 2008, denying his application for a certificate of appealability.

Upon careful consideration, the court concludes that it did not overlook or misapprehend any point of law or fact when it issued its order. Fed. R. App. P. 40(a). The petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk